No. 80-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID OLTERSDORF,

Petitioner,

vs.

CHESAPEAKE & OHIO RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District, First Division

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS WHY THE WRIT SHOULD BE DENIED

In *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490, 62 L. Ed. 2d 689, 100 S. Ct. 755 (1980), this Court reversed a $775,000 FELA verdict on the grounds that evidence of the effect of income tax on plaintiff's

decedent's future lost earnings should have been admitted and that an instruction informing the jury that their award was not taxable should have been given. In an attempt to avoid the plain application of *Liepelt* to the FELA case at bar, petitioner presents a maze of arguments. Some misstate the facts and some were never presented below. None are deserving of this Court's review. We respond to each point briefly as follows:

A. Alleged Lack Of Opportunity To Present Arguments In The Appellate Court (Pet., pp. 1, 6-7, 16-17)

The Illinois Appellate Court gave petitioner a full and fair hearing before rendering its decision herein. *Oltersdorf v. Chesapeake & Ohio R. Co.*, 83 Ill. App. 3d 457, 404 N.E. 2d 320 (1980). Petitioner filed a lengthy Appellate Court brief in which he was free to make any argument that he wanted. When the Appellate Court inquired of the parties whether they wished oral argument to proceed pending disposition of the *Liepelt* case by this Court, it was *petitioner* who insisted that the oral argument go ahead prior to the *Liepelt* decision.* At oral argument, petitioner was again given every opportunity to argue all aspects of his case (including his attempted distinguishment of *Liepelt*) and he did so. After the *Liepelt* decision was handed down, the Appellate Court permitted petitioner to file additional arguments (Pet., p. 6). After the Appellate Court opinion was rendered, petitioner filed a Petition For Rehearing. Finally, petitioner filed a Petition For Leave To Appeal in which he presented all his arguments to the Illinois Supreme Court which denied his Petition (A14-A15).

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* Petitioner's letter to Appellate Court dated 10/19/79.

B. Alleged Lack Of Impact On The Jury Award (Pet., pp. 9-10)

The income tax effect on the future earnings loss claimed in *Liepelt* and the instant case is almost identical: $163,673 (*Liepelt*, 444 U.S. at 492) and $161,318 (*Oltersdorf*, 404 N.E. 2d at 324). Moreover, as established by the *Liepelt* verdict ($775,000 with gross earnings loss of only $302,000), the so-called "intangible" (Pet., pp. 9-10) elements of a wrongful death award can be as significant as those in a personal injury action. In either case, the *Liepelt* rule requires that the portion of the award attributable to future earnings loss be equal to actual "monetary loss" (444 U.S. at 494), i.e., net earnings after deducting the taxes that the decedent or the injured plaintiff would have had to pay if the accident had not occurred. *Liepelt* does not require that the verdict be found "excessive" (Pet., pp. 8, 10). On the contrary, it was sufficient in *Liepelt* that refusal of the railroad's income tax evidence and instruction could have "inflated" the $775,000 verdict (444 U.S. at 497) —an equally obvious possibility with the $1,000,000 verdict in the case at bar.

C. Alleged Insufficiency Of The Offer Of Proof (Pet., pp. 8-9)

Petitioner challenges some of the actuary's tax effect calculations given in the railroad's offer of proof (Pet., pp. 8-9). But, at trial, petitioner had no objection or criticism of the offer of proof as such—in fact, he declined to ask the actuary any questions at all (A.264-265) and simply stood on his objection to any income tax effect evidence being received. At the new trial conducted under the *Liepelt* rule, petitioner will be free to attack the actuary's computations in any way he

deems fit. Thus, all of petitioner's arguments concerning future wage increases, inflation, taxation on interest earnings, tax deductions, tax rate and extended work life are at best cross-examination matters for the jury to consider in determining the weight to be given the actuary's testimony.

D. Alleged "Prospective" Application Of *Liepelt* (Pet., pp. 10-12)

The *Liepelt* rule was not given prospective only application, despite extensive argument seeking such a result (See *Liepelt* Petition For Rehearing, pp. 7-9). *Liepelt* was reversed for a new trial on the issue of damages just as the Appellate Court in the instant case ordered "a new trial on the issue of damages only" (404 N.E. 2d at 326). As noted by the Fifth Circuit Court of Appeals ordering a new trial on the issue of damages only under *Liepelt*, *Lang v. Texas & P. Ry. Co.*, 624 F. 2d 1275, 1279-1280 (5th Cir. 1980), plaintiff will still be "entitled to a just and adequate recovery" (624 F. 2d 1280 n. 9) and thus there is no "manifest injustice" as in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (Pet., pp. 11, 13), where retroactivity would have extinguished plaintiff's entire cause of action.

CONCLUSION

This case should proceed to a new trial on damages in accordance with the clear, comprehensive pronouncements by this Court in the *Liepelt* case. The Petition For A Writ Of Certiorari to the Appellate Court of Illinois, First District, First Division should be denied.

Respectfully submitted,

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